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Ask, Then Tell

An important pre-mediation exercise is to determine your best alternative to a negotiated agreement (BATNA). Are your alternative options better than what you can achieve in a negotiation? For litigated cases, that means evaluating the risks, odds, and costs of a better trial outcome versus a better settlement result. Actions always have consequences. But what can you do when it seems that the other side does not understand the consequences of failing to reach an agreement?

You could try to educate the other side by asking reality-testing questions designed to get them to think through the impact of not reaching agreement. By asking questions, the party is forced to think carefully about aspects of the dispute they may not have thought through yet. Also, misperceptions may be corrected when they try to answer the questions.

The next step is to let the other side know what you intend to do. Give them a chance to reconsider their refusal to negotiate before you use your BATNA. But be careful not to threaten the other side, suggests professor William Ury of Harvard Law School. A threat can backfire, changing the issue from a matter of dollars and cents to a test of their power and reputation. The difference lies in framing what you say as a warning, rather than a threat. A threat comes across as what *you will do* to them if they do not agree (subjective and confrontational). A warning comes across as *what will happen* if agreement is not reached (objective and respectful). A warning expresses the consequences of no agreement so that they appear to result from the situation itself. It is easier for your opponent to bend to objective reality than to back down to you personally.

For example, rather than threatening an arbitrary deadline, plaintiff's counsel might warn that the settlement demand is available today before his client incurs expensive attorney's fees and costs. Defense counsel might warn that the reserves formula the company sets aside for lawsuits changes each quarter, and after today a new quarter's formula will apply and today's settlement offer won't be available.

Deliver your warning with respect. Present your information in a calm, neutral tone and you will be perceived as in control and likely to follow through on your words.